

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION

THOMAS H CLAY,	§	
	§	
Petitioner,	§	
VS.	§	CIVIL ACTION NO. C-05-427
	§	
DOUGLAS DRETKE,	§	
	§	
Respondent.	§	

**MEMORANDUM AND RECOMMENDATION TO DENY**  
**SECOND MOTION FOR ENTRY OF DEFAULT**

Petitioner filed this petition pursuant to 28 U.S.C. §§ 2241, 2254, challenging his 2002 state court conviction for engaging in deadly conduct (D.E. 1). On August 25, 2005, service of process on respondent Douglas Dretke, Director of the Texas Department of Criminal Justice, Criminal Institution Division, was ordered (D.E. 5). The order for service of process required that a summons and copy of the petition be sent to the Texas Attorney General's Office (D.E. 5). Summons was issued on September 2, 2005. The summons was served on September 6, 2005, making a responsive pleading due October 21, 2005. On October 21, 2005, respondent Dretke filed a motion for an extension of time to file his response because all of the state court records had not yet been received (D.E. 11). Respondent's request was granted, and a due date for his responsive pleading was re-set to November 20, 2005 (D.E. 12).

On October 24, 2005, petitioner filed his first motion for entry of default (D.E. 13). A memorandum and recommendation was entered recommending that petitioner's motion be denied (D.E. 14). The motion has not yet been ruled upon by the District Court.

Respondent timely filed his motion for summary judgment on November 9, 2005 (D.E. 17). On December 7, 2005, petitioner filed a second motion for entry of default (D.E. 19).

**Applicable Law**

When a party against whom a judgment of affirmative relief is sought has failed to plead or otherwise defend a lawsuit in federal court and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default. Fed. R. Civ. P. 55(a). Entry of default in this case is not appropriate because respondent timely filed his motion for summary judgment before the November 20, 2005, deadline.

**Recommendation**

Based on the foregoing, it is respectfully recommended that petitioner's second motion for entry of default (D.E. 19) be denied.

Respectfully submitted this 28th day of December, 2005.

  
B. JANICE ELLINGTON  
UNITED STATES MAGISTRATE JUDGE

**NOTICE TO PARTIES**

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within **TEN (10) DAYS** after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to Fed. R. Civ. P. 72(b), 28 U.S.C. § 636(b)(1)(C) and Article IV, General Order No. 80-5, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within TEN (10) DAYS after being served with a copy shall bar that party, except upon grounds of *plain error*, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. Douglass v. United Services Auto Ass'n, 79 F.3d 1415 (5th Cir. 1996) (en banc).